

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JEFFREY B. GUINN, et al.,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE  
CORPORATION,

Defendant.

2:09-cv-01809-PMP-CWH

ORDER

Presently before the Court is Plaintiffs/Counterdefendants Coronado Canyons, LLC (“Coronado Canyons”), Sean P. Corrigan, Lisa D. Corrigan, and the S&L Corrigan Family Trust’s (the “Corrigans”) Motion to Dismiss the Counterclaims Relating to the Coronado Canyons, LLC Loan (Doc. #312), filed on September 12, 2014. Defendant/Counterclaimant Federal Deposit Insurance Corporation (“FDIC”) filed an Opposition (Doc. #314) on September 29, 2014. Coronado Canyons and the Corrigans filed a Reply (Doc. #315) on October 9, 2014. The FDIC filed a Surreply (Doc. #316) on October 20, 2014. The FDIC filed a Notice of Supplemental Authority (Doc. #317) on November 5, 2014. Coronado Canyons and the Corrigans filed a Response to the FDIC’s Notice of Supplemental Authority (Doc. #318) on November 7, 2014.

### **I. BACKGROUND**

The parties are familiar with the facts and extensive procedural history of this case, and the Court will not repeat them here except where necessary. The FDIC, the receiver for Community Bank of Nevada, Inc. (“Community Bank”), alleges that in 2007,

1 Coronado Canyons obtained a construction loan in the amount of \$29,020,000 from  
2 Community Bank. (Answer to the Third Am. Compl. & Countercls. & Third-Party Compl.  
3 (Doc. #25) [“Countercl.”] at 2, 8.)<sup>1</sup> Repayment of the loan was secured by a deed of trust  
4 on real property in Clark County, Nevada. (Id.) The FDIC further alleges that the  
5 Corrigans, among others, guaranteed repayment of the loan. (Id.) According to the FDIC,  
6 the loan matured on May 1, 2009, but neither Coronado Canyons nor the guarantors repaid  
7 the amount due. (Id.)

8 Coronado Canyons, the Corrigans, and other plaintiffs brought suit in Nevada  
9 state court alleging various claims against Community Bank on which judgment already has  
10 been entered. (Notice of Removal (Doc. #1), Ex. D; Order (Doc. #109).) Community Bank  
11 countersued, alleging claims for breach of contract, breach of guaranty agreements, and  
12 breach of the implied covenant of good faith and fair dealing against Coronado Canyons  
13 and the loan’s guarantors.<sup>2</sup> (Notice of Removal, Ex. G at 7-10.) After being appointed  
14 receiver for Community Bank, the FDIC removed the action to this Court on September 11,  
15 2009. (Notice of Removal.)

16 On April 8, 2011, the FDIC purchased the real property securing the loan at a non-  
17 judicial foreclosure sale for \$3,700,000. (Countercl. at 9.) On November 28, 2011, which  
18 was seven months and twenty days after the April 8, 2011, foreclosure sale, the FDIC  
19 amended its answer and counterclaims, adding a claim for application for deficiency  
20 judgment to its existing claims against Coronado Canyons and the guarantors. (Id. at 9-11.)

21 Coronado Canyons and the guarantors subsequently moved to dismiss the FDIC’s  
22 four claims related to the loan, arguing the FDIC’s deficiency judgment claim was untimely

23  
24 <sup>1</sup> The FDIC amended this pleading on October 26, 2012, however, the counterclaims at issue in this  
25 Motion were not amended. (First Am. Answer to the Third Am. Compl. & Countercls. & First Am.  
26 Third-Party Compl. (Doc. #85).)

<sup>2</sup> The FDIC also brought claims related to various other loans that are not at issue in this Motion, many  
of which claims were disposed of at summary judgment. (Order (Doc. #109).)

1 because it was not filed within six months of the foreclosure sale as required by Nevada  
 2 Revised Statutes § 40.455(1). (Coronado Canyons, LLC & the Guarantors' Mot. to Dismiss  
 3 All Claims Relating to the Coronado Canyons, LLC Loan (Doc. #28).) The FDIC  
 4 responded that it did not need to file an application for deficiency judgment within six  
 5 months of the foreclosure sale because it already had sued for breach of contract on the  
 6 promissory note and the guaranty before the foreclosure sale. (Opp'n to Mot. to Dismiss  
 7 All Claims Relating to the Coronado Canyons, LLC Loan (Doc. #29) at 3-4.) The FDIC  
 8 further argued its amended counterclaim that added the deficiency judgment claim relates  
 9 back to the filing date of its original counterclaims. (Id. at 5-6.) On May 14, 2012, the  
 10 Court certified to the Nevada Supreme Court three questions raised by the motion to  
 11 dismiss briefing.<sup>3</sup> (Order of Certification from the United States District Court for the  
 12 District of Nev. (Doc. #65).) The Court denied the motion to dismiss without prejudice  
 13 pending the Nevada Supreme Court's ruling on the certified questions. (Order (Doc. #59).)

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 15 <sup>3</sup> The questions certified were:

16 (1) Whether a creditor who asserts a breach of guaranty claim for relief against the  
 17 guarantors of a commercial loan prior to a foreclosure sale or trustee's sale of the  
 18 collateral securing the loan (which remains pending after the foreclosure sale or  
 19 trustee's sale) must either amend its pleading to formally state a claim for a deficiency  
 20 judgment or move for summary judgment on the deficiency within six months of the  
 21 foreclosure sale or trustee's sale to comply with NRS 40.455(1) and obtain a deficiency  
 22 judgment?

23 (2) If the answer to Question No. 1 is "yes," does a written letter from the creditor to  
 24 the guarantors' counsel within the context of settlement discussions, which identifies  
 25 the purported amount of the deficiency, and is delivered within six months of the  
 26 foreclosure sale, sufficient to constitute an application under NRS 40.455(1) to obtain  
 a deficiency as part of an existing litigation?

(3) Is NRS 40.455(1) a substantive statute of repose or a procedural statute of  
 limitations?

(Order of Certification from the United States District Court for the District of Nev. (Doc. #65)  
 at 2.)

1           On June 26, 2014, the Nevada Supreme Court entered an order declining to  
2 answer the certified questions, stating it recently had issued an opinion, Lavi v. District  
3 Court, 325 P.3d 1265 (Nev. 2014), which was controlling authority with respect to the first  
4 two questions. (Coronado Canyons, LLC, Sean P. Corrigan, Lisa D. Corrigan, & the S&L  
5 Corrigan Family Trust’s Mot. to Dismiss the Counterclaims Relating to the Coronado  
6 Canyons, LLC Loan (Doc. #312), Ex. 1 at 2.) The Nevada Supreme Court declined the  
7 third question because it was unable to determine the context in which the question was  
8 asked based on the parties’ stipulated statement of facts. (Id.)

9           Coronado Canyons and the Corriganes now move to dismiss all claims alleged  
10 against them in the amended counterclaims.

## 11 **II. DISCUSSION**

12           Coronado Canyons and the Corriganes move to dismiss the FDIC’s deficiency  
13 judgment claim, again arguing it is barred as a matter of law because the FDIC amended its  
14 counterclaims to add the claim after § 40.455(1)’s six-month deadline. Coronado Canyons  
15 and the Corriganes further argue that § 40.455(1) is a statute of repose and that 11 U.S.C.  
16 § 1821(d)(4), commonly known as the “FDIC extender statute,” does not extend the time to  
17 file an action that is barred by a state statute of repose. Coronado Canyons and the  
18 Corriganes also argue the FDIC’s breach of contract, breach of guaranty agreements, and  
19 breach of the implied covenant of good faith and fair dealing claims are moot and/or  
20 duplicative because the foreclosure sale limited the FDIC’s remedies to a deficiency  
21 judgment.

22           The FDIC responds that its deficiency judgment claim was timely under  
23 § 1821(d)(14), arguing that the FDIC extender statute applies to all periods of limitation,  
24 whether they are statutes of limitation or of repose. Specifically, the FDIC contends that in  
25 identifying the state time limitations that are displaced by its six-year time limitation, the  
26 plain language of the FDIC extender statute states it controls over the shorter “period

1 applicable under state law,” without distinguishing between statutes of limitation or repose.  
2 Alternatively, the FDIC argues that even if § 1821(d)(14) does not apply to statutes of  
3 repose, § 40.455(1) is a statute of limitations, and therefore is displaced by § 1821(d)(14).<sup>4</sup>  
4 Regarding its claims for breach of contract, breach of guaranty agreements, and breach of  
5 the implied covenant of good faith and fair dealing, the FDIC argues these claims are not  
6 moot as a result of the foreclosure sale, but concedes that its recovery on these claims may  
7 be reduced by the fair market value of the property it purchased at the foreclosure sale.

8 Moreover, for the first time on reply, Coronado Canyons and the Corrigan argue  
9 the Court should extend the holding from CTS Corporation v. Waldburger, 134 S. Ct. 2175  
10 (2014), to find that § 1821(d)(14) does not preempt § 40.455(1)’s time limitation. In its  
11 surreply, the FDIC argues the United States Supreme Court’s holding in Waldburger, which  
12 concerns another federal statute, should not be extended to apply to § 1821(d)(14).

13 Finally, the FDIC filed a Notice of Supplemental Authority regarding FDIC v.  
14 Rhodes, 336 P.3d 961 (Nev. 2014), which was issued after the briefing on Coronado  
15 Canyons and the Corrigan’s Motion to Dismiss was completed. The FDIC contends  
16 Rhodes clarified that § 1821(d)(14) expressly preempts §40.455(1)’s six-month time  
17 limitation. Coronado Canyons and the Corrigan respond to the Notice of Supplemental  
18 Authority, arguing that the preemption issue decided in Rhodes is a matter of federal law,  
19 and therefore Rhodes is not binding authority on this Court. Coronado Canyons and the  
20 Corrigan further respond that although Waldburger deals with another federal statute, the  
21 preemption principles in Waldburger are binding on this Court.

22 The Nevada Supreme Court held in Rhodes that § 1821(d)(14) expressly preempts  
23 § 40.455(1)’s six-month time limitation within which to bring a deficiency action,  
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25 <sup>4</sup> The FDIC abandons its previous arguments regarding whether its claim for breach of guaranty  
26 contract constitutes an application for deficiency judgment and its relation back argument, which were  
the genesis of the first two questions certified to the Nevada Supreme Court.

1 regardless of whether § 40.455(1) is a statute of limitations or repose. 336 P.3d at 963, 965-  
2 68. Whether a federal law preempts a conflicting state law is based on the Supremacy  
3 Clause of the United States Constitution, and therefore is an issue of federal law. See  
4 Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir.  
5 2002) (stating that “[f]ederal preemption of state law is rooted in the Supremacy Clause,  
6 Article VI, clause 2, of the United States Constitution”). Thus, the Nevada Supreme  
7 Court’s holding in Rhodes is not binding on this Court. The Court nevertheless agrees with  
8 the Nevada Supreme Court’s analysis in Rhodes, including its analysis of Waldburger, and  
9 therefore adopts its holding that § 1821(d)(14) expressly preempts § 40.455(1)’s six-month  
10 time limitation within which to bring a deficiency action.

11 Here, the FDIC amended its counterclaim to include a deficiency judgment claim  
12 seven months and twenty days after the foreclosure sale, the date on which the FDIC’s  
13 deficiency judgment claim accrued. Lavi, 325 P.3d at 1269 (stating that the right to a  
14 deficiency judgment vests when the secured property is sold). Given that this was within  
15 the six-year time limitation set forth in § 1821(d)(14), the FDIC’s deficiency judgment  
16 claim was timely. The Court therefore will deny Coronado Canyons and the Corrigan’s  
17 Motion as to the deficiency judgment claim.

18 Having read and considered the parties’ arguments regarding the FDIC’s remaining  
19 claims for breach of contract, breach of guaranty contract, and breach of the implied  
20 covenant of good faith and fair dealing, and good cause appearing, the Court also will deny  
21 Coronado Canyons and the Corrigan’s Motion as to these claims.

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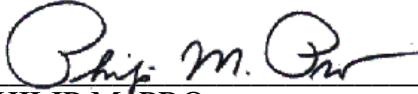
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1 **III. CONCLUSION**

2 IT IS ORDERED that Plaintiffs/Counterdefendants Coronado Canyons, LLC,  
3 Sean P. Corrigan, Lisa D. Corrigan, and the S&L Corrigan Family Trust's Motion to  
4 Dismiss the Counterclaims Relating to the Coronado Canyons, LLC Loan (Doc. #312) is  
5 hereby DENIED.

6  
7 DATED: January 12, 2015

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9 PHILIP M. PRO  
United States District Judge